APPEAL NO. 93377

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on April 7, 1993, in (city), Texas, before hearing officer (hearing officer). The appellant, hereinafter carrier, contends that the respondent's, hereinafter claimant, date of maximum medical improvement (MMI) became final because it was not timely disputed, and that the hearing officer accordingly erred in finding the claimant reached MMI on the date determined by the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The claimant did not file a response.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was employed by (employer), injured his back on (date of injury), while pulling an electric generator. He treated with (Dr. H), who diagnosed thoracic sprain and lumbar discogenic syndrome. Dr. H found claimant to have reached MMI on March 30, 1992, with an impairment rating of 27%. In a Form TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim), the carrier disputed Dr. H's impairment rating and requested the appointment of another doctor "to determine disability." The Commission thereafter appointed (Dr. A) as the designated doctor to resolve a dispute over the impairment

rating. Dr. A examined the claimant and certified MMI as of November 9, 1992, with a 10% impairment rating.

The hearing officer accepted the MMI date and impairment rating found by the designated doctor, Dr. A. In its appeal, the carrier contends that MMI was not in dispute, as it had not been disputed within 90 days. The carrier therefore asks this panel to render a decision that Dr. H's MMI date became final, and that the claimant reached MMI on March 30, 1992, with a 10% impairment rating.

The pertinent Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. While the rule does not expressly refer to MMI, this panel has held that it would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment yet allow an "end run" around this finality through the open-ended possibility of an attack on MMI. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Thus a carrier or claimant who disagrees either with the first impairment rating, or the finding of MMI on which it was based, must make known such dispute within the 90 days required by the rule; a failure to timely dispute one element renders both final, as impairment and MMI have been held to be intertwined for these purposes.

This case, of course, involves a situation where the carrier timely disputed impairment only. Applying the same logic by which we determined that in the absence of any timely dispute MMI and impairment either become final together, or not, it appears to us that if the first impairment rating has not become final because of timely dispute, it would follow that, under Rule 130.5(e), there is no basis to determine that MMI has become final. As we stated in Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993, in which the failure to timely dispute impairment made that rating final as well as the certification of MMI, "[a]s noted in Appeal No. 92670, *supra*, MMI and impairment rating become intertwined in applying the provisions of Rule 130.5."

Furthermore, while it is true that the designated doctor in this case was appointed to determine the issue of impairment, the report of a doctor who assigned an impairment rating without first determining that a claimant had reached MMI would be found to be faulty, or, at a minimum, premature. Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. Article 8308-4.26(d) presumes that a doctor shall assign an impairment rating only after he or she has certified that the employee has reached MMI; in addition, the Commission rule on designated doctors (Rule 130.6) requires the designated doctor to file a medical evaluation report which includes both a determination of MMI and an impairment rating under Rule 130.1. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

This is not to say that in cases similar to the instant case, a designated doctor could not be asked for an opinion as to whether he or she concurred with the date of MMI as certified by the prior doctor. We also have declined to say that MMI and impairment can never be separately decided or agreed upon under particular circumstances, such as where the doctors determining MMI arrive at the same date or where the parties mutually agree upon an MMI date. *See* Appeal No. 92366, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992, in which a carrier disputed the impairment rating assigned by the claimant's treating doctor. Thereafter, the Commission appointed a designated doctor who certified that the claimant had not reached MMI and accordingly did not give an impairment rating. Although the carrier argued that MMI had been reached and that the only issue was impairment, this panel upheld the hearing officer's determination that the claimant had not reached MMI and that the issue of impairment was premature. Noting that the 1989 Act provides that an impairment rating is not assessed until MMI is reached, Article 8308-4.26, we stated that "[t]herefore, it would seem prudent, if not essential, that a designated doctor would himself have to be satisfied that MMI had been reached before attempting to assess an impairment rating." We also stated that, absent the expiration of 104 weeks, when MMI is reached by operation of law, Article 8308-1.03(32), "the two matters (MMI and impairment rating) `may become somewhat inextricably tied together.'"

Based upon the foregoing, we hold that the hearing officer did not err in determining

the issue of MMI in this case, nor in holding that the claimant reached MMI on November 9, 1992, with a 10% whole body impairment rating, as determined by the designated doctor. We note that the hearing officer made a finding that the carrier disputed Dr. H's impairment rating. It is not entirely clear whether or not the hearing officer accorded presumptive weight to Dr. A's MMI date. As we stated in Appeal No. 92517, *supra*, addressing the fact that the designated doctor was appointed to determine impairment, "whether or not the designated doctor's determination on MMI was entitled to presumptive weight . . . we find no basis to hold that the hearing officer could not give appropriate weight to the medical evidence of the designated doctor who addressed the matter of MMI, and determine, based on all the medical evidence, that MMI had not been reached." *See also* Texas Workers' Compensation Commission Appeal No. 93124, decided April 1, 1993.

The hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur in the decision, based upon our interpretation of Rule 130.5, which is currently the sole source for imposing finality to MMI. The basis for my agreement is not that the MMI was automatically disputed along with impairment but rather that MMI didn't become final through Rule 130.5 because impairment didn't become final. The later express dispute over MMI date therefore was not precluded. I feel the majority opinion should not be misinterpreted as standing for the proposition that MMI and impairment are inexorably and automatically linked, because such interpretation would, in my opinion, contravene the statutory scheme devised by the legislature.

The separate statutes (Arts. 8308-4.25 and 4.26) about MMI and impairment clearly contemplate that parties can dispute one factor upon which impairment income benefits are calculated, but accept the other. Article 8038-4.26(f) gives the carrier the right to dispute

impairment, and pay Impairment Income Benefits (IIBS) based upon its own reasonable assessment of impairment. In essence, this commits the carrier to an "undisputed" zone of impairment, while the final rating is being evaluated through a designated doctor. I read these dispute provisions as indicating legislative understanding that, in the absence of a dispute over whether MMI is reached, the designated doctor's impairment rating would relate back to the uncontested MMI date. The designated doctor, in an impairment-only dispute, is brought on board to determine the ending date of IIBS.

In the case here, no one could reasonably read the paperwork leading to the appointment of the designated doctor as anything more than a quarrel over the percentage of impairment. To place carriers who agree to MMI in an "all bets are off" situation, coupled with the increasing delay in prompt resolution of disputes through the designated doctor process, can result, as it did here, in payment of benefits in excess of what would otherwise be due according to the presumptively neutral designated doctor's rating, had it been applied to the MMI date no one disputed. A carrier's statutory right to dispute the accuracy only of an impairment rating is a meaningless exercise if the date when IIBS are to begin is automatically assumed to be a moving target. (Conversely, a claimant who doesn't dispute that MMI was reached, but protests only the impairment rating, could be dealt an unpleasant surprise if a designated doctor decides after reviewing medical records that MMI was reached even earlier than the treating doctor stated.) Unless and until the topic of the shifting MMI date is dealt with by Commission rule, it may be that the only way the parties can ensure some stability when both agree upon MMI status is to enter into a written agreement.

Finally, I feel it would have been helpful for the hearing officer, prior to adopting the designated doctor's MMI date, to have held the record open to receive the designated doctor's opinion about the accuracy of the treating doctor's MMI date. The fact that a designated doctor says "MMI exists on the date of my examination" does not necessarily mean that it was not previously achieved. Indeed, when a person reaches MMI, every subsequent doctor should be able to certify MMI as of the date of his examination. Because Dr. A was not directed by the Commission to reexamine the treating doctor's assessment that claimant had reached MMI, he may not have assumed he had to render any MMI opinions other than to simply certify the existence of MMI as of the date he saw the claimant. I'd like to have known if Dr. A meant to say (as his MMI date has been enforced by the hearing officer) that MMI hadn't existed in March.

Susan M. Kelley
Appeals Judge